IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 165 of 1990

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PATEL MANIBHAI MOTIBHAI & 6 - Appellant(s)
Versus
PATEL LAXMANBHAI JETHABHAI & 5 - Defendant(s)

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Appearance :

MR SR PATEL for Appellant(s) : 1, 1.2.1, 1.2.2, 1.2.3, 1.2.4, 1.2.5,1.2.6 - 3.
MR RC JANI for Defendant(s) : 1 - 2, 2.2.1, 2.2.2, 2.2.3, 4,
RULE SERVED for Defendant(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 22/02/2007

ORAL JUDGMENT

1. Mr.S.R. Patel, learned counsel for the appellants and Mr.R.C. Jani, learned counsel for the respondent Nos.1,

2/3 and 4. Office report shows that Rule is served upon respondent No.3.

2. The appeal has been admitted for hearing the parties on the following substantial question of law;

“Whether the courts below are right in holding that there was partition in essence of evidence?”

3. The office has made the question in the following words:-

“Whether the court below are right in holding that there was partition in the effect of evidence?”

4. The plaintiffs, in all three in number, in their capacity as legal heirs of deceased Dungarbhai Hirabhai, had filed the suit for partition. It was submitted by them that the property in dispute was ancestral property, the same belonged to Dungarbhai Hirabhai and his two brothers, namely Shambhubhai Hirabhai and Jethabhai Hirabhai. It was submitted that the plaintiffs are entitled to have a decree of partition by metes and bounds and separate possession. The defendants appeared before the court

and submitted that the property was already partitioned, the partition was already effected between the three brothers and the property in dispute was not ancestral property, liable to partition. They accordingly prayed for dismissal of the suit. The learned trial court cast various issues and allowed the parties to lead evidence. The plaintiffs submitted that the lands were ancestral and they had a right in the property. The defendants, however, submitted and led evidence to the effect that a partition had already taken place as back as 50 years and the documentary evidence, Exhs.112 to 117, does not support the case of the plaintiffs.

5. The learned trial court, after hearing the parties and appreciating the evidence, recorded findings that the plaintiffs failed in proving that the property was ancestral property and the same could be put for partition. The trial court also held that Exhs.112 to 117 could not support the cause of the plaintiffs and Exh.121 was also of no consequence as it did not bear any date and was not produced anywhere, it accordingly dismissed the suit. The appellate court has confirmed the said findings and dismissed the appeal.

6. The learned counsel for the appellants submitted that the documents Exhs.112 to 117 and 121 have not been appreciated in their true perspective and the courts below were unjustified in holding that the suit documents were unreliable. It is also submitted that in view of the evidence available on the record, preponderance of probability would tilt the balance in favour of the plaintiffs and the courts below were unjustified in dismissing the suit.

7. On the other hand, learned counsel for the respondents - defendants submitted that if the two courts, after appreciating the oral evidence and after going through the documents so also after taking effect of the said documents have recorded findings of fact that partition had already taken place, then, such findings cannot be challenged in the second appeal.

8. The endeavour of the learned counsel for the appellants, in fact, was to persuade me to take another view of the matter. It is trite to say that second appellate court would interfere with the findings of fact only if the findings are

perverse i.e. evidence is available on the record and the court says that there is no evidence; there is no evidence on the record and the court reads something in the evidence; the court misreads the evidence and/or the findings are so palpably bad that the judicial conscious of the court is shocked.

9. Present is not a case where the findings can be said to be perverse. Even if the other view is possible, the same would not provide jurisdiction to the second appellate court to set aside the findings of fact and rerecord the same.

10. After going through the records and hearing the parties, I am unable to hold that the two courts below went wrong in recording the findings against the interest of the plaintiffs and dismissing the suit.

11. The appeal deserves to and is accordingly dismissed. No costs. Interim relief, if any, is vacated. Let a decree be framed accordingly.

(R.S. GARG, J.)

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